

The United Kingdom's Official Secrets Act 1989

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1. Persons to Whom the Law Applies

The United Kingdom's Official Secrets Act (1989)¹ regulates both primary disclosure of information by former and current public employees, including members of the security and intelligence services, the civil service and the armed forces, as well as secondary disclosure by anyone else. The Act differentiates among the penalties these various groups face if they engage in disclosure of information as well as the defences available to civil servants who engage in such disclosure.

1.1 Primary Disclosures

Section 1: Information Relating to Security or Intelligence

Members of the security and intelligence services (as well as some other civil servants who have been notified of penalties for unauthorized disclosure²) who make an unauthorized disclosure may be subject to penalty irrespective of whether the disclosure is damaging or not.³ The Act does not allow for a public interest defence in these particular cases and it is also irrelevant if the disclosed information was formally classified, or true or false.⁴

“Ordinary” civil servants (Crown servants and government contractors⁵) other than those specified in Section 1(1) are also prohibited to disclose “information, document or other article relating to security or intelligence which is or has been in his possession by virtue of [his] position.”⁶ Nonetheless, as opposed to the blanket ban on disclosures by members of security and intelligence services, ordinary civil servants may be penalized only when they make a “damaging disclosure.”⁷ Pursuant to Section 1(4), a disclosure is damaging if it causes or is likely to cause damage to the work of the security and intelligence services. The same provision also provides that the disclosed “information, document or article” will be damaging if it “falls within a class or description of information, documents or articles the unauthorized disclosure of which would be likely to have that effect.”⁸ As a result, even if the disclosed piece of information is not in itself damaging, the disclosure may still be penalized. Moreover, as Section 1(3) talks of “any

¹ Available at <http://www.legislation.gov.uk/ukpga/1989/6/contents>.

² OSA, Section 1(1)(b)

³ OSA, Section 1(1)

⁴ OSA, Sections 1(1) and 1(2)

⁵ OSA, Section 1(3)

⁶ OSA, Section 1(3)

⁷ OSA, Section 1(3)

⁸ OSA, Section 1(4)(b)

information” disclosed by civil servants, the information being formally classified is not a requirement for disclosure to have criminal implications.

Section 2: Information Relating to Defence

Disclosure of a piece of “information, document or other article relating to defence”⁹ may be penalized if it is damaging.¹⁰ Disclosure of information relating to defence will be considered damaging if it damages or is likely to damage the capability of the armed forces to conduct their tasks, leads to a loss of life or injury of those forces or to serious damage to the equipment of those forces, endangers the interests of the United Kingdom or endangers the safety of British citizens abroad.¹¹ The provision refers to “*any* information, document or other article” (emphasis added), regardless of whether it is classified or not.

Section 3: Information Relating to International Relations

Section 3 of the Act concerns the unauthorized, damaging disclosure by a civil servant of “any information, document or other article relating to international relations”¹² or “any *confidential* information, document or other article” (emphasis added) obtained from a foreign state or international organization.¹³ Section 3(2) provides a definition of what constitutes a “damaging” disclosure of the above information, although the definition’s breadth is subject to criticism. Disclosure is considered damaging if it does or is likely to “[endanger] the interests of the United Kingdom abroad, seriously [obstruct] the promotion or protection by the United Kingdom of those interests or [endanger] the safety of British citizens abroad.”¹⁴ According to Section 3(3), the confidential status of the disclosed information acquired from a foreign state or an international organization may be sufficient for establishing its disclosure’s damaging impact.

Section 4: Information Impacting Crime and Special Investigation Powers

Civil servants are barred from disclosing *any* information, document or other article that does or is likely to result in the commission of an offence, facilitate an escape from legal custody, or impede criminal examinations.¹⁵ Pursuant to Section 4(3), the unauthorized disclosure of information that was acquired by warranted secret surveillance is also forbidden.

1.2 Secondary Disclosures

Section 5: Information Resulting from Unauthorized Disclosures or Entrusted in Confidence

⁹ OSA, Section 2(1)

¹⁰ OSA, Section 2(1)

¹¹ OSA, section 2(2)(a)-(c)

¹² OSA, Section 3(1)(a)

¹³ OSA, Section 3(1)(b)

¹⁴ OSA, Section 3(2)(a)-(b)

¹⁵ OSA, Section 4(2)(a)-(b)

The Act also penalizes certain disclosures by “anyone”. Section 5 criminalizes the damaging,¹⁶ or expectedly damaging,¹⁷ disclosure of information by any person who has acquired it from a civil servant disclosing it through primary disclosure¹⁸ or if the information has come to the person’s possession via secondary disclosure.¹⁹

Section 6: Information Entrusted in Confidence to Other State or International Organizations

Section 6 makes the secondary disclosure by any person of any information relating to security or intelligence, defence or international relations which has been communicated in confidence by or on behalf of the United Kingdom to another state or to an international organization an offence,²⁰ if its disclosure is damaging or could reasonably be expected to be damaging.²¹

1.3 Refusal to Return Confidential Information

Section 8(6) provides that: “Where a person has in his possession or under his control any document or other article which it would be an offence under section 6 above for him to disclose without lawful authority, he is guilty of an offence if he fails to comply with an official direction for its return or disposal.”

2. Defences and Knowledge Requirement

The Act provides for only one defence for members of the security and intelligence services: according to Section 1(5), the person needs to prove lack of knowledge, or lack of reasonable cause to believe, that the information disclosed related to security or intelligence.

That defence is also available to other civil servants who disclose information about security and intelligence, defence or international relations.

“Ordinary” civil servants disclosing information on security and intelligence, defence, international relations or crime may also rely on the defence of claiming that they did not know or had no reasonable cause to believe that the disclosure would have a damaging impact (as defined by the respective subsections).

In the case of secondary disclosure of information (whose primary disclosure was unauthorized or conducted in confidence), the person engaging in secondary disclosure may only be penalized if he or she disclosed the information without lawful authority knowing, or having reasonable cause to believe, that it was protected against disclosure by the Act.²² Furthermore, a person who

¹⁶ OSA, Section 5(3)(a)

¹⁷ OSA, Section 5(3)(b)

¹⁸ OSA, Section 5(1)(a)(i)-(ii)

¹⁹ OSA, Section 5(1)(a)(iii)

²⁰ OSA, Section 6(1)(a)

²¹ OSA, Section 6(2)

²² OSA, Section 5(2)

discloses information relating to security and intelligence, defence or international relations, will only commit an offence if the disclosure is damaging and he or she had knowledge or a reasonable cause to believe that disclosure would be damaging.²³ As far as information relating to security and intelligence, defence and international relations which the United Kingdom has communicated to a foreign state or international organization,²⁴ its secondary disclosure is prohibited by anyone if it is damaging, or if the person possessing the information knows or has reasonable cause to believe that the disclosure would be damaging.²⁵

3. Scope of info covered

The UK act is restricted in scope to information concerning security and intelligence,²⁶ defence,²⁷ international relations²⁸ or crime.²⁹

4. Penalties

Section 10(1) of the Act sets forth a maximum of 2 years imprisonment or an unlimited fine or both for conviction following indictment of any of the offences in the Act other than mere possession (see below).³⁰ Following summary conviction without indictment, the prison sentence may not be longer than six months and/or the fine may not exceed the statutory maximum.³¹

5. Related offences under the OSA: mere possession

Sections 8(1) et seq. prohibit the mere possession by a Crown servant or government contractor of “any document or other article which it would be an offence under any of the foregoing provisions of this Act for him to disclose without lawful authority”. The offence carries a maximum penalty of 51 weeks.³²

6. Cases

Since the OSA 1989 entered into force, ten public employees with authorized access to confidential information, a writer and an MP’s staff member have been prosecuted under the Act for disclosures to the public, as detailed below, and at least one was prosecuted for selling top

²³ OSA, Section 5(3)

²⁴ OSA, Section 6(1)

²⁵ OSA, Section 6(2)

²⁶ OSA, Section 1

²⁷ OSA, Section 2

²⁸ OSA, Section 3

²⁹ OSA, Section 4

³⁰ OSA, Section 10(1)(a)

³¹ OSA, Section 10(1)(b)

³² See amended section 10(2) of OSA, at

<http://www.legislation.gov.uk/ukpga/2003/44/schedule/26/paragraph/39/prospective>.

secret information to a foreign government.³³ In four of the public disclosure cases, charges were eventually dropped; and in another, a jury found the official not guilty. In one case, an official who pled guilty was fined. Two officials (a former MI6 agent and a navy petty officer) were each sentenced to 12 months (reduced to six months in the case of the MI6 agent); and four others were sentenced to eight, six, three and two months in jail, respectively. In most of the cases, the officials lost their jobs.³⁴ Details about these 12 cases follow.

Charges Dropped in Four Cases

1. Derek Pasquill, a Foreign Office civil servant, was arrested and suspended with pay from his job in January 2006 for having leaked to a journalist Whitehall documents pertaining to the US practice of extraordinary rendition and UK government policy towards Muslim groups. He was charged with six counts of violating the OSA in September 2007. The case against him collapsed after internal FCO papers revealed that Pasquill's leaking of the information had actually been helpful in starting a constructive debate, and that one senior official had written that disclosure had not caused any harm, including to national security and international relations.³⁵ On January 9, 2008, charges were dropped against him, but he was dismissed from his job for gross misconduct in August 2008.³⁶
2. In November 2003, charges were brought against Katharine Gun, a translator for General Communications HQ (GCHQ), a British intelligence agency, for having leaked an email from the US National Security Agency requesting the UK's assistance in bugging the offices of six UN Security Council members that were considered swing votes on the

³³ E.g. David Houghton, a former Secret Intelligence Service employee, was charged under the OSA in 2009 for attempting to sell information marked as "secret" and "top secret," including the names, addresses and phone numbers of 426 British spies, to Dutch agents for £2m. He was sentenced to 12 months in prison on September 3, 2010. *Former MI6 man Daniel Houghton admits secrecy breach*. BBC News, 14 July 2010, as accessed:

<http://www.bbc.co.uk/news/10629017>; *Bungling spy who tried to betray MI6 secrets for £2m walks free*. Daily Mail, 4 September 2010, as accessed: <http://www.dailymail.co.uk/news/article-1308718/MI6-worker-Daniel-Houghton-jailed-trying-sell-secrets.html#ixzz1h56xLtel>; Davies, Caroline. *MI6 man tried to sell colleagues' names for £2m*. The Guardian, 3 September 2010, as accessed: <http://www.guardian.co.uk/world/2010/sep/03/mi6-man-jailed-selling-names>

³⁴ In addition, on March 2, 2011, two Special Forces officers were charged under the OSA and released on bail. An internet search yielded no further information about these prosecutions.

Police investigate secrets breach. The Independent, 09 April 2011, as accessed: <http://www.independent.co.uk/news/uk/crime/police-investigate-secrets-breach-2265581.html>; *Military Officials Secret Act 'breach' investigated*. BBC News, 9 April 2011, as accessed: <http://www.bbc.co.uk/news/uk-13024330>; *Special Forces scandal as officers are held 'for trying to leak secrets'*. Daily Mail, 9 April 2011, as accessed: <http://www.dailymail.co.uk/news/article-1375048/SAS-officers-held-trying-leak-secrets-Libya-Afghanistan.html#ixzz1h5Qwv5YM>

³⁵ Norton-Taylor, Richard. *Civil servant who leaked rendition secrets goes free*. The Guardian, 10 January 2008, as accessed:

<http://www.guardian.co.uk/media/2008/jan/10/pressandpublishing.medialaw>

³⁶ Wikibin, <http://wikibin.org/articles/derek-pasquill.html>.

issue of approval of the invasion of Iraq. The prosecution dropped the charges on Feb 25, 2004, the trial's opening day, shortly after the defence had asked the government for any records of advice about the legality of the war that it had received during the run-up to the war.³⁷ The government did not state its reasons for dropping the charges but it is assumed that it did not want to risk having to disclose the requested documents. Gun was fired by GCHQ.

3. On December 3, 1998, the home of Tony Geraghty, a British-Irish writer and journalist, was searched and he was interviewed by the Ministry of Defence Police, after his book "The Irish War" on security and intelligence operations in Northern Ireland was published. Geraghty was charged with breaching Section 5(6) of the OSA in May 1999 on the basis that he took possession of protected documents and made a damaging disclosure by quoting from classified army documents in the book.³⁸ In searching his house, the authorities did not find any copies of the documents he cited in the book. Accordingly, the attorney general ended the prosecution.
4. The police also searched the home of Geraghty's co-defendant, Nigel Wylde, a former government contractor. They came across evidence that indicated that Wylde had passed five confidential documents to Geraghty. Wylde was charged with making a damaging disclosure.³⁹ Charges were dropped against him only on November 1, 2000, when it became evident that "The Irish War" contained no information that had not already been publicly available, and therefore could not be damaging.

Found not guilty by a jury

5. In February 2008, Nicholas Thompson, a senior Essex detective, was accused of leaking sensitive information and naming the maker of a confidential phone call in violation of Section 4(1) of the OSA.⁴⁰ He stood trial for two offences of unlawful disclosure of police information. A Southwark Crown Court jury found him not guilty of both charges in January 2005. However, Thompson, who had been required to resign from the Essex police when charged, did not get his job back.⁴¹

³⁷ Oliver, Mark. *GCHQ whistleblower cleared*. The Guardian, 25 February 2004, as accessed: <http://www.guardian.co.uk/uk/2004/feb/25/iraq.pressandpublishing>

³⁸ See: http://en.wikipedia.org/wiki/Tony_Geraghty; Campbell, Duncan. Led by the nose. The Guardian, 2 November 2000, as accessed: Norton-Taylor, Richard. *Secrets breach denied*. The Guardian, 23 June 1999, as accessed: <http://www.guardian.co.uk/politics/1999/jun/23/freedomofinformation.uk1> <http://www.guardian.co.uk/politics/2000/nov/02/freedomofinformation.uk>;

³⁹ Norton-Taylor, Richard. *Secrets breach denied*. The Guardian, 23 June 1999, as accessed: <http://www.guardian.co.uk/politics/1999/jun/23/freedomofinformation.uk1>

⁴⁰ *Officer bailed on secrets charges*. BBC News, 18 February 2004, as accessed: http://news.bbc.co.uk/2/hi/uk_news/england/essex/3500701.stm

⁴¹ *Detective sacked after disciplinary hearing*: <http://www.bernardmahoney.com/essexboystng/articles/dsadh.html>

Fined; no custodial sentence

On October 28, 2008, Richard Jackson, a senior civil servant at the UK Ministry of Defence, pleaded guilty to an offence under Section 8(1) of the Official Secrets Act 1989. Jackson had inadvertently left highly sensitive Whitehall intelligence files relating to Al-Qaeda and Iraq on a train, which were considered to have the potential to damage national security and UK international relations. The documents were found by members of the public. The City of Westminster Magistrates Court fined Jackson £2,500.⁴²

Served a custodial sentence

1. Richard Tomlinson, a British former MI6 officer, was charged and arrested in 1997 for violating the OSA by giving a 4-page synopsis of a proposed book detailing his career to an Australian publisher, even though it was never claimed that he had revealed any secret information. When it became clear that he would likely be held in pre-trial detention for two years, the maximum penalty he could serve, he instead pled guilty, was sentenced to 12 months in prison, and was released after six months for good behaviour. The book, named *The Big Breach*, was published in Moscow in 2001. After the Court of Appeal of England and Wales ruled in his favour, the book was made available in the UK. However, the British Government obtained a court order to confiscate proceeds from the book. In September 2008, MI6 ended all legal objections to the book, released the proceeds to Tomlinson, and admitted that its previous legal actions had been disproportionate. However, MI6 refused to reinstate him or compensate him for the loss of his career and pension.⁴³
2. In October 1998, Steven Hayden, a Chief Petty Officer in the Royal Navy was jailed for 12 months after he sold secret information to the Sun newspaper for £10,000 for a story about an alleged plot by Iraq's leader Saddam Hussein to launch anthrax attacks in the UK. Hayden pleaded guilty to disclosing information relating to security and intelligence contrary to Section 1 of the OSA.⁴⁴
3. Thomas Lund-Lack, a Scotland Yard employee, was charged with misconduct and breaching the OSA for having leaked secret information about a planned al-Qaida attack to the Sunday Times. He pleaded guilty to wilful misconduct in a public office and denied the latter charge.⁴⁵ He was sentenced for wilful misconduct and on July 27, 2007, he was jailed for eight months.⁴⁶

⁴² Tran, Mark. *Civil servant fined £2,500 for leaving secret al-Qaida files on train: Richard Jackson pleads guilty to breaching Official Secrets Act*. The Guardian, 28 October 2008, as accessed: <http://www.guardian.co.uk/uk/2008/oct/28/terrorism-security-secret-documents>

⁴³ See http://en.wikipedia.org/wiki/Richard_Tomlinson.

⁴⁴ *UK Anthrax officer jailed for a year*. BBC News, 23 October 1998, as accessed: http://news.bbc.co.uk/2/hi/uk_news/199796.stm

⁴⁵ See <http://z13.invisionfree.com/julyseventh/index.php?showtopic=1912>

⁴⁶ See: <http://z13.invisionfree.com/julyseventh/index.php?s=43936a5148cc5d512e8aac1370351637&showtopic=1912&st=7>

4. and 5. In May 2007, David Keogh, a civil servant in the secret Pindar complex underneath the Ministry of Defence was convicted of disclosing a memo, marked secret, which was damaging to international relations. Leo O'Connor, a researcher working for the Labour MP for Northampton South, Tony Clarke, was convicted of having received the memo. The memo included information about a meeting on the situation in Iraq between US President George Bush and British Prime Minister Tony Blair at the White House in April 2004. O'Connor slipped the memo into a stack of the MP's papers, and when the MP found it, he called the police. While the memo's contents were never made public, high-level government witnesses at the three-week trial said it referred to operations by MI6 in Iraq and was "extremely sensitive" to U.S and British foreign policy. The defence lawyer said that the memo also referred to Blair's efforts to persuade Bush not to bomb Al Jazeera in Qatar. The defence's argument that the disclosure was not damaging was rejected. Keogh was sentenced to six months in jail and ordered to pay £5,000 in costs to the prosecution, and O'Connor was sentenced to three months.⁴⁷
6. On 24 August 1997, *The Mail on Sunday* published articles based on information related to security and intelligence (composed of 28 files on seven topics, including several on Libyan links with the IRA, Soviet funding of the Communist party of Great Britain, agents' names and other highly sensitive information). A former Security Service member, David Michael Shayler, was charged with having leaked the information. However, before publication of the articles, Shayler had left the United Kingdom for France. The UK sought his extradition for violation of the OSA on three counts (under Sections 1 and 4 of the Act). On his voluntary return to face the charges in 2000, he was arrested and subsequently tried. During the proceedings he argued that the disclosures he had made were in the public and national interest, a defence that Sections 1 and 4 of the OSA do not allow. The Court of Appeal concluded that these provisions were not incompatible with Article 10 of the European Convention on Human Rights,⁴⁸ and the House of Lords upheld the decision.⁴⁹ On November 5, 2002, Shayler was sentenced to six months in prison, but was released from jail after serving seven weeks under a home detention curfew scheme.⁵⁰

⁴⁷ Summers, Chris. *When should a secret not be a secret?* BBC News, 10 May 2007, as accessed: <http://news.bbc.co.uk/2/hi/uk/6639947.stm>; *Secrets-leaker handed prison term*. Reuters, 10 May 2007, as accessed: <http://uk.reuters.com/article/2007/05/10/uk-britain-trial-secrets-idUKL1060345320070510>; Wikipedia, http://en.wikipedia.org/wiki/O'Connor%E2%80%93Keogh_official_secrets_trial.

⁴⁸ Regina v. Shayler [2002] UKHL 11, as accessed: <http://www.publications.parliament.uk/pa/ld200102/ldjudgmt/jd020321/shayle-1.htm>; Wagner, Adam. *Human rights and the Official Secrets Act*. The Guardian, 19 September 2011, as accessed: <http://www.guardian.co.uk/law/2011/sep/19/official-secrets-act-human-rights-act>

⁴⁹ R v David Michael Shayler (2001) (summary), as accessed: http://www.1cor.com/1315/?form_1155.replyids=495

⁵⁰ *Freed Shayler vows to clear his name*. The Guardian, 23 December 2002, as accessed: <http://www.guardian.co.uk/uk/2002/dec/23/davidshayler>; Norton-Taylor, Richard. *Former MI5 officer released from prison*. The Guardian, 24 December 2002, as accessed:

7. The 1911 OSA

Section 2 of the Official Secrets Act 1911 made any communication of official information by a civil servant an offence, other than a communication to "a person to whom he is authorised to communicate it, or a person to whom it is in the interest of the State his duty to communicate it".

In the 1985 OSA prosecution of the civil servant Clive Ponting, who leaked information showing that ministers had misled Parliament about the sinking of the Argentinian cruiser General Belgrano, the defence argued that the phrase "in the interest of the State" meant the public interest. The judge ruled that, as a matter of law, the interests of the state referred to the policies laid down by the government of the day, not any wider public interest which may have motivated the defendant, however genuinely he believed in it. However, the jury acquitted Ponting, in effect disregarding the judge's ruling. It is generally assumed that they believed the government had behaved worse than did Ponting.

The Act contained a defence for disclosures which were in the interest of the State, which was abolished with passage of the 1989 Act.

However, the legacy of the Ponting case lives on and it has been difficult for the government to bring prosecutions, even when there has been a clear breach of the law.

An earlier case concerned Sarah Tisdall, a Foreign Office clerk who, in 1983, leaked documents to the Guardian that revealed when US nuclear cruise missiles would arrive in England (and also how the then Minister of Defence, Michael Heseltine, would explain their arrival to the House of Commons).⁵¹ The Guardian refused to disclose the source, the high court agreed, but the court of appeal reversed. The court concluded that, although the document did not harm national security but only concerned parliamentary tactics and thus was covered by the protection of sources (section 10) provision of the Contempt of Court Act, the sort of unreliable public servant who had leaked the document might leak something more dangerous next time, and so had to be exposed. The Guardian, forced by court order, provided the documents which led to Tisdall's being identified. In 1984 she was convicted and served six months.⁵² The Guardian, however, was never tried for the secondary disclosure.

<http://www.guardian.co.uk/uk/2002/dec/24/davidshayler.richardnortontaylor?INTCMP=ILCNETTXT3487>

⁵¹ Preston, Peter. *A source of great regret*. The Guardian, 5 September 2005, as accessed: <http://www.guardian.co.uk/media/2005/sep/05/pressandpublishing.politicsandthemedial>

⁵² From the Archive Blog: *22 October 1983: Sarah Tisdall*. The Guardian, as accessed: <http://www.guardian.co.uk/theguardian/from-the-archive-blog/2011/jun/03/guardian190-sarah-tisdall-1983>.